Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

85-545 (1)

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

DONALD WYRICK,
Warden of the Missouri State Penitentiary,
BILL ARMONTROUT,
Assistant Warden of the
Missouri State Penitentiary,
LT. "GARY" WYRICK,
Petitioners,

v.

RONALD L. PARTON,
Respondent.

ON PETITION FROM THE UNITED STATES COURT
OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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I

QUESTIONS PRESENTED

1. Whether the ruling of the United States Court of Appeals for the Eighth Circuit permitting district judges to exclude within their discretion evidence which is "conditionally relevant" under Rule 104(b) of the Federal Rules of Evidence is contrary to the language and intent of that rule.

2. Whether the conflict in circuits created by the decision of the United States Court of Appeals for the Eighth Circuit warrants the review of this issue by this Court.

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United States v. Barletta, 652 F.2d 218 (1st Cir. 1981);

Federal Rules of Evidence Rule 104;

C. Wright and K. Graham Federal Practice and Procedure § 5054 (1978).

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OPINIONS BELOW

The opinion and judgment of the United States Court of Appeals for the Eighth Circuit, affirming the judgment of the court below appears at 766 F.2d 336 (8th Cir. 1985). The order of the United States District Court for the Western District of

Missouri entering the jury verdict against petitioners appears in Appendix B.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Eighth Circuit affirming the judgment of the District Court entering the jury verdict in favor of respondent under Title 42 U.S.C. § 1983, was filed on June 25, 1985. Pursuant to Title 28 U.S.C. § 2101(c), the present petition for a writ of certiorari was required to be filed within 90 days of the entry of this judgment, on or before September 23, 1985. The jurisdiction of this Court is invoked under Title 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

1. Title 42 U.S.C. § 1983 provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or

> the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

2. Federal Rules of Evidence Rule 104 provides as follows:

> (a) Questions of admissibility generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In

making its determination it is not bound by the rules of evidence except those with respect to privileges.

(b) Relevancy conditioned on fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

(c) Hearing of jury. Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require or, when an accused is a witness, if he so requests.

(d) Testimony by accused. The accused does not, by testifying upon a preliminary matter, subject himself to cross-examination as to other issues in the case.

> (e) Weight and credibility. This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

STATEMENT OF THE CASE

This is an action to recover damages brought pursuant to 42 U.S.C. § 1983. Ronald L. Parton, an indigent inmate, proceeding in forma pauperis, filed a civil rights suit and named as defendants former Warden Donald Wyrick, former Associate Warden Bill Armontrout and Lt. James G. "Gary" Wyrick of the Missouri State Penitentiary and Classification Caseworker Assistants Richard Strobietto and Robert St. John of the Missouri Training Center for Men in Moberly, Missouri.

Respondent claimed that petitioners Wyrick, Armontrout and Lt. Wyrick struck and/or kicked respondent and that defendants Strobietto and St. John beat respondent unconscious with black jacks after

respondent was returned to the Missouri State Penitentiary for his role in a disturbance at the Missouri Training Center for Men in August, 1980. Petitioners and defendants emphatically denied striking respondent and maintained that respondent's alleged injuries were incurred during, or as a result of, respondent's participation in the inmate disturbance at the Missouri Training Center for Men.

This case was tried to a jury on May 8-11, 1984, with the Honorable Richard H. Ralston, United States Magistrate presiding pursuant to Title 28 U.S.C. § 636(c). In their case in chief, petitioners called Donna Mueller to the stand. Ms. Mueller, a private citizen, donated a part of her time in volunteer work with inmate programs. In this capacity she became acquainted with respondent and his ex-wife. Ms. Mueller also visited with inmates at the penitentiary. During one such visit, Ms.

Mueller overheard a conversation between respondent and his ex-wife. Ms. Mueller pinpointed the date of the conversation to be a week to two weeks after respondent had been returned to the Missouri State Penitentiary, in August, 1980. At the time, Ms. Mueller knew that respondent had been brought back from the Missouri Training Center in Moberly, Missouri for his participation in an inmate disturbance and had heard that he had filed a lawsuit alleging he had been hurt. Ms. Mueller testified, without the jury being present in an offer of proof:

> I heard him talking to his wife, asking her if she had heard from the attorney. Then--really what caught my attention was his wife's voice. It sounded like she was crying, without turning and looking at them, just the sound of her voice. It sounded like she was crying or about to cry.

> Q. What did she say?
>
> A. She said she was afraid that they would find out that Ron [respondent] was lying.
>
> Q. Did he have a response to that?
>
> A. He said, "Don't worry. They are not going to find out."

The United States Magistrate sua sponte suggested there was insufficient foundation for Ms. Mueller's testimony because it had not been conclusively demonstrated that the statements attributed to respondent specifically referred to the lawsuit at bar and ultimately sustained an objection to that effect, precluding Ms. Mueller's testimony. Petitioners in a further offer of proof offered to show that respondent had no other lawsuit drafted or filed than the instant case, at the time the conversation took place, and that a lawyer had been sought to represent respondent at that time.

The Court rejected this offer of proof. Thus, the exclusive basis for the District Court's ruling was that the petitioners were required to positively establish the connection between Ms. Mueller's testimony and this lawsuit before her testimony would be admissible.

The jury returned a verdict in favor of defendants Richard Strobietto and Robert St. John and against petitioners Donald Wyrick, Bill Armontrout and Lt. James G. "Gary" Wyrick for $15,000 in actual damages and $75,000 in punitive damages. Petitioners Wyrick, Armontrout and Lt. Wyrick timely filed their Motion for Judgment Notwithstanding the Verdict, or Alternatively for New Trial or for Remittur and then filed an appeal to the United States District Court for the Eighth Circuit when the motion was denied.

On appeal petitioners argued that the district court erred as a matter of law

excluding the testimony of petitioners' witness Donna Mueller, that respondent had stated that the attorneys were not going to find out that respondent was lying, because this testimony was conditionally relevant under Federal Rule of Evidence 104(b), and the jury could reasonably conclude from the evidence offered by petitioners that this statement referred to the lawsuit at bar. Further, the omission of Ms. Mueller's testimony was grossly prejudicial because, as admitted by the District Court, this testimony was "devastating" to respondent's case. The Court of Appeals held that "district court determinations under Rule 104 are subject to review under an abuse of discretion standard" Parton v. Wyrick, 766 F.2d 336, 337 (8th Cir. 1985), and that no abuse had occurred.

The basis for the District Court's jurisdiction to try a case alleging a violation of Title 42 U.S.C. § 1983 was

Title 28 U.S.C. § 1331 and Title 28 U.S.C. § 1343(3) and (4).

ARGUMENT

The essential issue in this petition is whether this Court should allow the courts under its supervision to, at their discretion, exclude evidence which under Rule 104(b) of the Federal Rules of Evidence is "conditionally relevant". Specifically Rule 104(b) provides that certain preliminary questions of fact with respect to the relevance of evidence are to be determined by the jury rather than the judge. This exception to the policy under Rule 104(a) of the Federal Rules of Evidence of making the judge the final arbiter on admissibility issues is for the purpose of preserving the right to a trial by jury and not just a trial by judge especially in the cases where, as in the case at bar, the fact considered as conditionally relevant coincides with an ultimate trial issue. C.

Wright and K. Graham, Federal Practice and Procedure § 5054 p. 266 (1978). The policy adopted by the United States Court of Appeals for the Eighth Circuit of reviewing the judge's exclusion of conditionally relevant evidence, which petitioners maintain is an invasion of the jury's function, utilizing an abuse of discretion standard is inherently unfair and improper.

The decision of the Eighth Circuit Court of Appeals in the present cause merits review by this Court because it is contrary to decisions of other circuits and will work grave injury to the uniform interpretation of the Federal Rules of Evidence and the interest of justice not only in the State of Missouri but in all states within the Eighth Judicial Circuit.

Because the decision by the Eighth Circuit Court of Appeals affects the uniform application of the Federal Rules of Evidence it merits review by this Court for the

purpose of settling whether the interpretation by the Eighth Circuit is the correct one or whether the interpretation of the First Circuit Court of Appeals in Bowden v. McKenna, 600 F.2d 282, 284 (1st Cir. 1979) and United States v. Barletta, 652 F.2d 218, 219 (1st Cir. 1981), the Second Circuit Court of Appeals in O'Neal v. Morgan, 637 F.2d 846, 851 (2nd Cir. 1980) and the Fifth Circuit Court of Appeals in Ballou v. Henri Studios, Inc., 656 F.2d 1147, 1154 (5th Cir. 1981) is correct.

In the case at bar, the United States Magistrate after hearing petitioners evidence to allow the testimony of their witness stated:

> "I understand that if the jury believes the statement, that the statement relates to the lawsuit, it would have just a devastating effect on the lawsuit, in my judgment....It is unlike most situations that have minimal impact on a lawsuit."

Nonetheless, the judge excluded the witness's testimony and did not allow the jury to hear the evidence and decide whether they believed the information was relevant to the lawsuit. Because the case is nothing other than a test of credibility between petitioners and respondent, when the magistrate excluded petitioners' witness, he invaded the jury's function by assessing credibility. The Eighth Circuit reviewed the magistrate's decision only for an abuse of discretion. Typically the abuse of discretion standard is applied where the trial judge is in a better position to assess the situation at trial, however, the Eighth Circuit applied that standard to the instant case where the question is one of the application of a Federal Rule of Evidence. The Notes of the Advisory Committee on Proposed Rules of Evidence illustrate the contrary position taken by the Eighth Circuit:

> "If preliminary questions of conditional relevancy were determined solely by the judge, as provided in subdivision (a), the functioning of the jury as a trier of fact would be greatly restricted and in some cases virtually destroyed. These are appropriate questions for juries."

As the writers of Federal Practice and Procedure noted:

> "Relevance involves no technical questions that the jurors are incapable of understanding; questions of the proper inferences to be drawn from evidence are regularly submitted to the jury for their resolution in deciding the case on the merits. There is no reason to suppose that the jurors are less disposed than the judge to adhere to the requirement of relevance or that their decisions will be any less predictable than his."

Wright and Graham § 5054 at 266-267. The result the Eighth Circuit reached, allowing

the district court discretion to remove the determination of the relevance of the witness's testimony from the jury is inopposite to the intent and meaning of Rule 104(b). The holdings of the First, Second and Fifth Circuits which deny the trial courts in their jurisdiction the discretion to make a fact finding decision keeping conditionally relevant evidence from juries best implements the intent of Rule 104(b). It is important to the interests of justice to resolve the conflict in interpretation of Rule 104(b) of the Federal Rules of Evidence. Multiple interpretations by the various circuits prevents a uniform enforcement of the Federal Rules of Evidence.

The instant case presents an appropriate avenue for this Court to consider what standard is to be applied in the review of applications of Rule 104(b) because as admitted by the magistrate, the

conditionally relevant evidence, had it been admitted in the case at bar, would have been dispositive of the case. Indeed, had the same facts come before the First, Second, or Fifth Circuits, petitioners submit the evidence excluded would have been admitted.

In light of the need for this important question to be resolved it is necessary for the Court to grant certiorari in this case.

CONCLUSION

For the reasons stated herein, petitioners respectfully pray that this Court grant the instant petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals
For The Eighth Circuit

No. 84-1852

Ronald Lee Parton,	*
	*
Appellee,	*
	*
v.	*
	*
Donald Wyrick,	*
Bill Armontrout,	*
and Lt. Gary Wyrick,	*
	*
Appellants.	*
	*
Warrant Officer Strobietto and	*
Warrant Officer St. John	*

Appeal from the United States District Court for the Western District of Missouri.

Submitted: June 12, 1985

Filed: June 25, 1985

Reported at:

Before HEANEY, Circuit Judge, FLOYD R. GIBSON, Senior Circuit Judge, and BOWMAN, Circuit Judge.

HEANEY, Circuit Judge.

Donald Wyrick, Bill Armontrout and Gary Wyrick appeal from an adverse jury verdict in a civil rights suit brought under 42 U.S.C. § 1983 by Ronald Parton, alleging cruel and unusual punishment in violation of the eighth and fourteenth amendments to the United States Constitution. For reversal, the prison officials argue that the district court erred in excluding impeachment testimony of a government witness. After carefully reviewing the record, we affirm the judgment of the district court.

Ronald Parton, an inmate in the Missouri Penal system, was transferred to the Missouri State Penitentiary from the Missouri Training Center for Men (MTCM) because of his alleged role in a disturbance at MTCM. In this suit, Parton alleged (and the jury found) that, when he returned to the penitentiary, he was beaten by penitentiary officials. Medical records

establish that Parton was hospitalized for four days as a result of his injuries; he was knocked unconscious, suffered multiple hematomas, and complained of headaches and dizziness. The jury decided in Parton's favor and awarded $15,000 in actual damages and $75,000 in punitive damages against the three prison officials who appeal to this Court.

The prison officials argue that the district court erred in declining to admit the testimony of Donna Mueller. In an offer of proof, elicited in the jury's absence to determine the foundation for the evidence, Mueller testified that she overheard a conversation between Parton and his then-wife, in which Parton's wife allegedly said "she was afraid that they would find out that Ron was lying," to which Parton allegedly replied, "'[d]on't worry they aren't going to find out.'" (Tr. 445-46;, Offer of Proof Re: Donna Mueller's

testimony.) Although Mueller said she was within ten feet of the couple and recalled the approximate date and substance of the remarks we have set forth, she heard nothing else to link the conversation to this lawsuit. She agreed with the district court that she "really didn't know what the general conversation was about," and testified:

> To be honest with you, it was so long ago that the only thing that still sticks in my mind is her saying she was afraid they would find out that he was lying and him saying that, not to worry about it, that they wouldn't find out.

Tr. 447-48 (emphasis added).

Based on this colloquy, the district court concluded that the foundation was insufficient "to link it to this lawsuit, these claims, or any statement as made in this lawsuit."

The district court makes determinations of this sort under Fed. R. Evid. 104(b):

> When the relevency of evidence depends upon the fulfillment of a condition of fact, the judge shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

We have previously decided that district court determinations under Rule 104 are subject to review under an abuse of discretion standard. United States v. Gerhart, 538 F.2d 807, 810 (8th Cir. 1976). We find no such abuse here.

Accordingly, we affirm the judgment of the district court.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

On May 11, 1985, the Honorable Richard H. Ralston, United States Magistrate after trial of the cause and the rendering of a jury verdict, ordered and adjudged the following, caption and signature omitted:

that the jury unanimously finds in favor of the plaintiff Ronald Parton and against defendant Donald Wyrick and assesses $5,000.00 actual damages and $40,000.00 punitive damages.

that the jury unanimously finds in favor of the plaintiff Ronald Parton and against the defendant Bill Armontrout and assess $5,000.00 actual damages and $20,000.00 punitive damages.

that the jury unanimously finds in favor of the plaintiff Ronald Parton and against the defendant Gary Wyrick and assesses $5,000.00 actual damages and $15,000.00 punitive damages.

that the jury unanimously finds in favor of the defendant R. Strobietto and against the plaintiff.

that the jury unanimously finds in favor of the defendant R. St. John and against the plaintiff.

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Petitioners,

vs.

RONALD L. PARTON,
Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

STATUTES INVOLVED

1. Rule 104 of the Federal Rules of Evidence provides as follows:

> (a) Questions of admissibility generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.
>
> (b) Relevancy conditioned on fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or

subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

(c) Hearing of jury. Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require or, when an accused is a witness, if he so requests.

(d) Testimony by accused. The accused does not, by testifying upon a preliminary matter, subject himself to cross-examination as to other issues in the case.

(e) Weight and credibility. This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

2. Rule 403 of the Federal Rules of Evidence provides as follows:

Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

STATEMENT OF THE CASE

Respondent makes the following additions and corrections to Petitioners' Statement of the Case: The testimony of Petitioners' witness in the offer of proof made no reference as to how the statement in question was connected to this lawsuit. A review of the record reveals the following:

THE COURT: Miss Mescher, I would like you to take this witness' testimony outside the presence of the jury as an offer of proof so I can make an accurate determination, particularly in regard to the foundation.

Q (By Miss Mescher.) Mrs. Mueller, were you in the visitor's lounge at one point—

THE COURT: Mrs. Mueller, at what point was this?

THE WITNESS: It was shortly after Ron had come back from Moberly.

THE COURT: Can you give me an approximate date on that?

THE WITNESS: Just like I said, it was shortly after he had come back from Moberly to MSP.

THE COURT: By shortly, what do you mean? A week? Two weeks?

THE WITNESS: A week or two weeks.

THE COURT: Would you put it in time in late August?

THE WITNESS: If that is a week or two afterwards, yes, sir.

THE COURT: Proceed.

Q (By Miss Mescher.) And how close were you to Mr. Parton and his wife?

A. I was sitting right next to them.

Q What were you doing while you were there?

A I was waiting for an inmate to come in.

Q Did you happen to overhear a conversation?

A Yes, I did.

THE COURT: Before we get to that, I want to know a little bit more about it. Were they seated at the table?

THE WITNESS: No.

THE COURT: Were they seated at the couch or chairs?

THE WITNESS: Couch or chairs.

THE COURT: Were they separated by a screen?

THE WITNESS: No.

THE COURT: They were in the open visitor's room?

THE WITNESS: Yes.

THE COURT: And were they facing each other?

THE WITNESS: Well, the chairs are along the wall and he was in one chair and she was right next to him, or on the couch. They were right next to each other.

THE COURT: Where were you?

THE WITNESS: Right next to that.

THE COURT: A chair down? Two chairs down?

THE WITNESS: No. There is like a row of chairs or couches and they all sit right next to one another. So I was right to the next set of chairs.

THE COURT: Could you give me some approximation that is distance? Were you within ten feet of them?

THE WITNESS: I was probably closer than that jury box would be to me.

THE COURT: So you would say you were at least within ten feet of them?

THE WITNESS: Yes.

Q (By Miss Mescher.) Could you hear what they were saying?

A When I first went into the visiting room, I said hello to Ron and his wife. Then I could hear conversation.

Q How loud were they speaking?

A Not extremely loud. Not out of ordinary conversation. Not above that level.

Q Were they speaking to you?

A No. They were speaking to each other.

Q Do you have an inclination of what the context of the conversation was about?

A Well, I knew that Ron had been brought in from Moberly and I knew, had heard that he had filed a suit, because he had been hurt.

Q And what did you hear him say?

A I heard him talking to his wife, asking her if she had heard from the attorney. Then—really what caught my attention was his wife's voice. It sounded like she was crying, without turning and looking at them, just the sound of her voice. It sounded like she was crying or about to cry.

Q What did she say?

A She said she was afraid that they would find out that Ron was lying.

Q Did he have a response to that?

A He said. "Don't worry. They are not going to find out."

Q Did you overhear anything else they said to each other?

A About that time one of the little children in the room came up and knocked into the table that was in front and spilled some stuff and there was a big commotion clearing up what was spilled.

Q Did you hear anything more that they might have said to one another?

A No. Then the other inmate came in and I talked and then I left shortly after that.

Q Did that inmate know the Partons?

A Yes.

Q Was there any conversation between the Partons and that inmate?

A "Hello. How are you?"

Q Anything to do with the lawsuit?

A No.

MISS MESCHER: That would be my offer of proof.

THE COURT: Did you know this one conversation was to be about this lawsuit or a charge against the Department of Corrections or the people that work for the Department of Corrections?

THE WITNESS: I could just tell what I heard, which was, "Have you heard from the lawyers?" I heard her say she was worried that they would find out he was lying.

THE COURT: Did they say lying about what?

THE WITNESS: No.

THE COURT: Did you know it to be discussed in this particular lawsuit or these claims?

THE WITNESS: Did she say this particular?

THE COURT: Yes.

THE WITNESS: No.

THE COURT: You don't know what the general subject matter of the conversation was about?

THE WITNESS: Just what I heard.

THE COURT: What did you hear? Is that all that you heard, what you just related?

THE WITNESS: That's all I heard.

THE COURT: Did they mention any claim against Donald Wyrick? Did you hear them talking about any claim against Donald Wyrick?

THE WITNESS: To be honest with you, it was so long ago that the only thing that still sticks in my mind is her saying she was afraid they would find out that he was lying and him saying that, not to worry about it, that they wouldn't find out.

THE COURT: Did you ever hear Mr. Wyrick's name mentioned in the conversation?

THE WITNESS: Not that I remember.

THE COURT: Did you ever hear Mr. Strobietto's name mentioned in the conversation?

THE WITNESS: I didn't even know who this is.

THE COURT: How about Mr. Armontrout?

THE WITNESS: No.

THE COURT: How about Mr. St. John?

THE WITNESS: No.

THE COURT: How about Mr. Gary Wyrick?

THE WITNESS: No.

THE COURT: So in other words what you are telling me, you really didn't know what the general conversation was about? You only heard her saying something to the effect, "What if they catch you lying?" And his response was, "They won't."

THE WITNESS: That's right.

THE COURT: Miss Mescher, I don't see, with that kind of foundation, how I can allow it in evidence.

MISS MESCHER: That's a ruling you have to make, your Honor. I am making this as an offer of proof.

The trial court never refused to hear any offer of proof or attempted offer of proof tendered by Petitioners. The following dialogue occurred between the District Court and Petitioners' Counsel:

THE COURT: Upon what inference would I base that connection? My ruling might be otherwise if you could show by way of foundation that these claims are potential claims against the Missouri Department of Corrections was involved. (T. 488 lines 22-25)

MISS MESCHER: That's all I know, your Honor. I have information from another witness that I didn't intend to call. That's the only foundation I can offer from this testimony. Other information leads me to believe there was conversation about the lawsuit and another party to the conversation also heard it. (T. 449 lines 1-6)

THE COURT: Now, you made an offer of proof last night. You offered to show that your offer of

proof was that Mr. Parton had no other lawsuit pending at the time. How would you intend to prove that?

MISS MESCHER: I would call Mr. Parton and ask him if he filed any other suits at the time. From our records, he has not, but I would call him and ask him. (T. 548 lines 12-18)

THE COURT: The problem is your witness can't link it to the lawsuit.

MISS MESCHER: The fact there is no appointed lawyer doesn't mean one was contacted. I didn't ask if Parton talked to a lawyer and neither did Mr. Riner.

I would offer and I would ask him if he would put him to—to ask him if he had any other lawsuits pending, if he tried to contact a lawyer about this. I think from Parton's testimony they were trying to get this kind of situation rectified. At least Mr. Parton testified he talked to everyone who would listen to him.

THE COURT: I have addressed it once and I have addressed it twice. I understand that if the jury believes the statement, that the statement relates to the lawsuit, it would have just a devastating effect on the lawsuit, in my judgment.

I have given it some very weighty discussion. I have discussed it with my law clerk. I have thought about it back and forth I thought about it last night, and a half an hour at the recess when it was first posed to me.

It is unlike most situations that have minimal impact on a lawsuit. I think this kind of testimony would have devastating effect on the lawsuit if the

jury believed that the statement linked to this lawsuit itself. But I just don't think the link is there.

MISS MESCHER: It would be my position that that is a decision they could make after hearing the foundation evidence, all that I could put on, and then make the decision themselves what to believe and to what it went to. (T. 550 lines 23-25) (T. 551 lines 1-25) (T. 552 line 1)

ARGUMENT

The ruling of the United States Court of Appeals for the Eighth Circuit is not in conflict with other circuits and conforms with Rules 104(b) and 403 of the Federal Rules of Evidence.

The Circuit Courts of Appeal are not in conflict with the proposition that a trial court has broad discretion in determining relevancy of evidence and that a trial court's ruling on admissibility of evidence should not be disturbed absent a clear and prejudicial abuse of discretion, *Pesaplastic, C.A. v. Cincinnati Milacron Co.*, 750 F.2d 1516, 1524 (11th Cir. 1985), *Consolidated Grain and Barge Company v. Marcona Conveyor*, 716 F.2d 1077, 1083 (5th Cir. 1983), *Charles v. Daly*, 749 F.2d 452, 463 (7th Cir. 1984), *United States v. Catalano*, 491 F.2d 268, 273 (2nd Cir. 1974), *cert. den.*, 419 U.S. 25 (1974), *O'Rourke v. Eastern Air Lines, Inc.*, 730 F.2d 842, 854 (2nd Cir. 1984), *Beacham v. Lee-Norse*, 714 F.2d 1010, 1014 (10th Cir. 1983), *Hill v. Rolleri*, 615 F.2d 886, 890 (9th Cir. 1980), *Beatty Shopping Center, Inc. v. Monarch Ins. Co. of Ohio*, 315 F.2d 467, 471 (4th Cir. 1963), *McKinney v. Galvin*, 701 F.2d 584, 586 (6th Cir. 1983), *Construction, Ltd. v. Brooks-Skinner Building Company*, 488 F.2d 427, 431 (3rd Cir. 1973), *Wade v. Haynes*, 663 F.2d 778, 783 (8th Cir. 1981).

The Eighth Circuit's ruling does not affect the uniform application and interpretation of the Federal Rules of Evidence in the area of conditional relevancy as petitioners suggest, because at trial there was no evidence offered tying the contested statement to the case at hand. (See respondent's Statement of the Case.) Because of that, the rulings of the Eighth Circuit and the District Court are not in conflict with the cases cited by petitioners. A brief review of those cases demonstrates the distinctions. In *O'Neal v. Morgan,* 637 F.2d 846 (2nd Cir. 1980), the plaintiff attempted to elicit testimony concerning an admission allegedly made by a defendant that the defendant had beaten the plaintiff's husband. The beating itself was the subject of the lawsuit. There was then a direct connection between the statement and the case, and the statement was relevant.

In *United States v. Barletta,* 652 F.2d 218 (1st Cir. 1981), a police informer called the defendant seeking an admission to a crime. Because of the nature of the call, the court could infer the conversation was about the criminal activity being investigated making the statement relevant to the case. *Bowden v. McKenna,* 600 F.2d 282 (1st Cir. 1979), involved an action against police officers by the widow of a man killed by the officers moments after the commission of a crime. The contested statements and actions explaining the conduct of the plaintiff's deceased husband and the defendants took place at the time of the incident itself. They were, in effect, part of the *res gestae.* Thus, as in *O'Neal* and *Barletta,* there was a direct connection between the offered evidence and the subject of the lawsuit. Such a connection is lacking in the instant case. Petitioners were given every opportunity to tie the statement of witness Donna Mueller to the case, but were unable to do so.

Finally, *Ballou v. Henri Studios, Inc.*, 656 F.2d 1147 (5th Cir. 1981) involved a simple credibility choice made by a trial judge. The trial court there chose to believe the testimony of a witness rather than test results of a blood test and incorrectly excluded evidence of the test results on the basis that it lacked credibility. In the instant case credibility was not the basis of the ruling.

Thus, the opinion of the Eighth Circuit and the ruling of the District Court are not in conflict with other circuits or the cases cited by petitioners, and the discretion of the District Court should not be questioned.

CONCLUSION

WHEREFORE, respondent requests this Court deny petitioners' request for a Writ of Certiorari.

Respectfully submitted,

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